Supreme Court, U.S.
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No. _____

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

DONALD P. MANGANO, SR.,
Petitioner,

v.

UNITED STATES OF AMERICA,
Respondent.

Petition for Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

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PETITION FOR WRIT OF CERTIORARI

WILLIAM J. GENEGO *
ELIZABETH A. NEWMAN
LAW OFFICES OF
WILLIAM J. GENEGO
100 Wilshire Boulevard
Suite 1000
Santa Monica, California 90401
(310) 394-5802
Attorneys for Petitioner
* Counsel of Record

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QUESTIONS PRESENTED

A. Whether the bank fraud statute, 18 U.S.C. § 1344, which makes it a crime to execute a scheme to defraud a financial institution, authorizes multiple punishments where the scheme to defraud alleged by the indictment is completed only once?

B. Whether a count of an indictment charging a violation of the bank fraud statute is deficient where it fails to charge an essential element of the offense—that the defendant "executed" or "attempted to execute" a scheme to defraud a bank—and instead alleges only that the defendant performed an act "for the purpose of" executing a scheme to defraud a bank?

C. Whether a defendant may be convicted of violating the bank fraud statute, which makes it a crime to execute a scheme to defraud "a financial institution," based on evidence that the scheme defrauded federal bank regulators, rather than a financial institution?

LIST OF PARTIES TO THE PROCEEDING IN THE COURT OF APPEALS

United States of America, plaintiff-appellee.

Donald P. Mangano, Sr., defendant-appellant.

John Lee Molinaro, defendant-appellant (not a party to this petition).

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PETITION FOR WRIT OF CERTIORARI

The petitioner, Donald P. Mangano, Sr., respectfully prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Ninth Circuit, entered in the above-entitled proceeding on November 17, 1993.

OPINIONS BELOW

The opinion of the court of appeals, Appendix at 1a (hereafter "App. —"), is reported as *United States v. Molinaro*, 11 F.3d 853 (9th Cir. 1993). The order of the court of appeals denying a petition for rehearing and a suggestion for rehearing en banc, App. 25a, and the district court ruling modified by the court of appeals, are unreported.

JURISDICTION

On petitioner's appeal of his conviction, the Ninth Circuit on November 17, 1993, affirmed the judgment of the district court. *Molinaro, supra.* The Ninth Circuit denied

petitioner's petition for rehearing and rejected his request for rehearing en banc on September 19, 1994. App. 25a.

The jurisdiction of this Court to review the judgment of the Ninth Circuit is invoked under 28 U.S.C. § 1254(1).

CONSTITUTIONAL, STATUTORY, AND OTHER PROVISIONS INVOLVED

The following provision is set forth in the Appendix (App. 26a): 18 U.S.C. § 1344.

STATEMENT OF THE CASE

A. Factual Background

This prosecution stemmed from the government's claim that Petitioner Donald P. Mangano, Sr., and his codefendant, John Molinaro, engaged in a fraudulent scheme that allowed them to sell a bank they owned, Ramona Savings & Loan ("Ramona"), for personal financial gain by falsely creating the impression that the bank was profitable. The scheme took considerable time to complete, and involved numerous transactions, among them Mr. Mangano's secret acquisition from Ramona of a large resort condominium complex, Cherokee Village. Ramona had financed Cherokee Village, but the complex had become a large non-earning asset for the bank, affecting the bank's profitability. Mr. Mangano's secret acquisition of Cherokee Village caused Ramona to appear financially healthy, which in turn permitted it to be sold, to the benefit of Mr. Mangano and Mr. Molinaro.

Mr. Mangano has been a quadriplegic confined to a wheelchair since 1957, when, at age twenty, he was struck by bulbar polio and spent eighteen months in an iron lung. Overcoming this severe handicap, Mr. Mangano became a successful businessman. By the late 1970s, he owned his own construction company, and he later earned a $1 million unsecured line of credit with Bank of America. In April, 1984, Mr. Mangano and Mr. Molinaro

purchased Ramona for approximately $3.9 million, each becoming a half-owner of the bank. Mr. Mangano divested himself of his entire interest in Ramona on May 15, 1985, when he sold his fifty-percent share to Mr. Molinaro on a note.

While Mr. Mangano was half-owner of Ramona, Ramona acquired a land lease in Palm Springs, California, to build a resort condominium complex, Cherokee Village. By the time Mr. Mangano sold his interest in Ramona, Cherokee Village was almost complete, and individual units were being shown as sales models. After Mr. Mangano divested himself of all his interest in Ramona, federal bank regulators began to pressure Ramona to sell Cherokee Village. The project had faltered after the tax code changed, affecting the tax benefits for ownership of second homes. By the summer of 1985, only seven of the 180 units had been sold, and Ramona had contracted with a hotel corporation to operate the complex as a resort hotel. Cherokee Village thus represented a large non-earning asset for Ramona. Mr. Molinaro, who had been authorized by Ramona's board of directors to sell Cherokee Village, proposed to Mr. Mangano that he purchase the project.

Mr. Mangano believed that Cherokee Village was a sound project. (This belief ultimately proved to be correct; in later years, Cherokee Village became a successful and profitable resort under a different name.) He was reluctant to purchase the project, however, because he did not wish to assume personal liability for the operation of a hotel. Moreover, he did not wish to assume personal liability for the loans he would have to obtain to buy Cherokee Village, because the loans would affect the ability of his construction company to borrow funds for other projects.

Mr. Mangano ultimately agreed to purchase Cherokee Village after he devised an arrangement that allowed him to avoid personal liability for the loans and the operation

of the hotel. Although the arrangement was impressively complex, expert witnesses at trial testified that it was legitimate and that it reflected and accommodated the interests of both the buyer and the seller.

Under the purchase and sale arrangement, Ramona sold individual Cherokee Village units to three people, Dariano, DeCarlo, and Calvello, their attorney. Each of the units was individually priced in accordance with an independent appraisal; the total sale amounted to $22.816 million. Ramona provided 100% financing, at twelve-and-a-half percent interest for thirty years, and required that the loans to make the purchases be fully secured by first and second trust deeds on each unit. The loans provided that any subsequent purchaser of the property would take the property "subject to" the loans. This provision meant that Dariano, DeCarlo, and Calvello would remain liable for the loan amounts even if they later transferred the units. In addition, the loans were "cross-collateralized" by five parcels of land in Palm Springs that the three men bought from Mr. Mangano.

On the day they bought the Cherokee Village units, Dariano, DeCarlo, and Calvello transferred the units to three subchapter "S" corporations they had formed the day before. The five parcels of land purchased from Mr. Mangano were also transferred to the corporations. Mr. Mangano then purchased 100% of the stock of each of the three corporations for $500,000, with an agreement that required Dariano, DeCarlo, and Calvello to serve as officers and directors of the corporations for one year. The loans that Ramona had made to the three men to enable them to buy the units were still secured by first and second trust deeds on the units, and by the five parcels in Palm Springs. Furthermore, the "subject to" provision of the loans left the three men the obligated parties on the loans. Dariano, DeCarlo, and Calvello retained a sixth parcel of property purchased from Mr. Mangano.

In October, 1985, 136 of the units were sold in this manner. Three months later, in January, 1986, thirty-seven additional units were similarly transferred. Between the dates of the two sales, Ramona agreed to pay $287,000 in bond assessments due on the five parcels of property in Palm Springs.

When the transactions were complete, the three subchapter "S" corporations owned 173 units of Cherokee Village and five parcels of property, all encumbered to Ramona, and Mr. Mangano owned 100% of the stock in the three corporations. Ramona gained by removing a significant non-earning asset from its books and by making a profit of $4 million on the transaction. Mr. Mangano gained by avoiding personal liability both for Cherokee Village as a hotel and for the loans Ramona made to Dariano, DeCarlo, and Calvello to enable them to buy the Cherokee Village units.

The government maintained that the transaction was structured in this manner to fraudulently conceal Mr. Mangano's participation in it. Mr. Mangano maintained that the transaction was a legitimate business arrangement, structured to accomplish Ramona's goals as well as his own. At trial, Stanford law professor Kenneth Scott, former general counsel to the Federal Home Loan Bank Board, and Edith Warkentine, a former law professor at the University of Puget Sound, who had practiced and taught in the areas of secured transactions, commercial loans and real estate transactions, both supported Mr. Mangano. They testified that particular aspects of the transaction, including the use of nominees and the 100% financing, were not uncommon and were grounded in the legitimate interests of the parties.

In January, 1986, Mr. Molinaro reached an agreement to sell his entire interest in Ramona to Donald Stump. When the sale was negotiated, Stump owned a real estate development property called Rancho Cielo, which he had purchased with a $10 million loan from Ramona that

was still outstanding. Before Stump completed his purchase of Ramona, he quitclaimed his interest in Rancho Cielo to Robert Rumney for nominal consideration. (Stump had no equity in Rancho Cielo, since the outstanding note was equivalent to the value of the property.) On the day that the quitclaim was executed, Ramona, through Mr. Molinaro, extended for three years the principal and interest payments on a $40,000 loan to Rumney and paid Rumney $2,000 on an invoice for consulting services.

Later that year, Mr. Molinaro, acting for Ramona, apparently began to negotiate with a third party who wanted to acquire Cherokee Village. Mr. Molinaro therefore sought to repurchase Mr. Mangano's Cherokee Village units. Mr. Mangano and Mr. Molinaro were at odds with each other at this time, and at first could not agree on a price. Ultimately, they agreed on a price of $1 million, and, in April, 1986, Mr. Mangano reconveyed his shares in the subchapter "S" corporations to Dariano, DeCarlo, and Calvello, who then conveyed them to Ramona.

In June, 1986, the Federal Home Loan Bank Board ("FHLBB") began an audit of Ramona. Federal regulators took control of the bank in September, 1986. Cherokee Village continued to operate (under a different name) and became a successful resort.

B. The Indictment

The government obtained a grand jury indictment that charged Mr. Mangano and Mr. Molinaro with thirty counts of bank fraud (18 U.S.C. § 1344) and one count of conspiracy (18 U.S.C. § 371). The indictment also charged Mr. Molinaro alone with two counts of making a false entry in Ramona's books (18 U.S.C. § 1006).

Although Mr. Mangano was charged with thirty separate violations of the bank fraud statute, the indictment alleged a single scheme to defraud Ramona:

> *The scheme* involved a series of sham transactions in October 1985 and January 1986 whereby defendants MOLINARO and MANGANO, without the knowledge or approval of Ramona's officers and directors, caused Ramona to extend loans in the total amount of approximately $29,360,000 to straw borrowers for the purpose of purchasing 173 Cherokee Village units, which were subsequently transferred to defendant MANGANO. *The scheme* enabled defendant MANGANO to secretly acquire Cherokee Village, and allowed defendant MOLINARO to placate the [Federal Home Loan Bank Board] by taking the Cherokee Village investment off Ramona's books.
>
> *The scheme* further enabled defendants MOLINARO and MANGANO to make Ramona appear to be operating at a profit so that Ramona could be sold for $7,200,000, and defendants MOLINARO and MANGANO both could benefit from the proceeds of the sale.

Second Superseding Indictment (hereafter "Indictment") at ¶¶ 19-20 (emphasis added).

Although the thirty counts each charged a separate violation of the bank fraud statute, none of the counts alleged that Mr. Mangano or Molinaro had "executed" or "attempted to execute" the scheme to defraud. Instead, each of the counts identified a separate act and alleged that the act had been committed "for the purpose of" executing a scheme to defraud Ramona.

C. The District Court Proceedings

Before trial, Mr. Mangano moved to dismiss the bank fraud counts on the ground that they were multiplicitous (i.e., that multiple counts in the indictment charged a single crime).[1] The district court denied the motion in a written order. App. 22a.

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[1] When the motion was filed, the indictment charged twenty-seven bank fraud counts. It was not refiled when a second superseding

Trial began on July 18, 1989. On October 4, 1989, the jury returned a verdict of guilty as to all counts.

Mr. Mangano was sentenced on June 11, 1990.[2] The district court imposed three consecutive five-year terms on the first three counts, suspended imposition of sentence on the remaining counts, and imposed five years' probation.[3] Mr. Mangano filed a timely notice of appeal to the Ninth Circuit Court of Appeals.[4]

D. The Direct Appeal

In his direct appeal, Mr. Mangano contended, *inter alia*, that the bank fraud counts were multiplicitous because the indictment alleged only a single scheme which, according to the government and by its very nature, could be executed and completed only once. He also argued that the bank fraud counts failed to state a crime, because

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indictment added three more bank fraud counts. The government argued that Mr. Mangano's failure to refile his motion waived his claim that the bank fraud counts were multiplicitous. The court of appeals rejected the argument. *Molinaro*, 11 F.3d at 858 n.9.

[2] Mr. Mangano was initially sentenced on February 13, 1990. Prior to sentencing, he filed objections to the presentence report, which the court failed to resolve. He was sentenced to fifteen years in prison, a consecutive term of five years' probation, $6.7 million in restitution, and costs of approximately $6,000.

After Mr. Mangano filed a timely notice of appeal, the government conceded, based on an intervening decision of the Ninth Circuit, that the district court had erred in failing to resolve Mr. Mangano's objections to the presentence report prior to sentencing. A new sentencing hearing was therefore held on June 11, 1990, and the same sentence was imposed.

[3] At the time of the conduct for which Mr. Mangano was sentenced, a violation of the bank fraud statute was punishable by five years' imprisonment. It is now punishable by twenty years' imprisonment. *Compare Molinaro*, 11 F.3d at 859 n.11 (statute as of the time of Mr. Mangano's conduct), *with* App. 26a (statute as it currently stands).

[4] Mr. Mangano was granted bail pending appeal and remains on bail at this time.

none of the counts alleged an execution or attempted execution of the scheme. In addition, he argued that the bank fraud statute applies only to a scheme to defraud a financial institution, whereas the district court had allowed the government to argue that the jury could convict if it found that the scheme had defrauded federal bank regulators.

Mr. Mangano's appeal was argued and submitted on December 7, 1992.[5] In an opinion filed on November 17, 1993, the Ninth Circuit agreed in part with Mr. Mangano's argument that the bank fraud counts were multiplicitous. The court held that 18 U.S.C. § 1344 punishes an "execution" or attempted execution of a scheme to defraud, not each act in furtherance of the execution or attempted execution. *Molinaro*, 11 F.3d at 860.

The court's application of its holding, however, conflicted with its own definition of an "execution," conflicted with opinions from at least two other circuits, and was inconsistent with opinions from at least three other circuits. It reconfigured the indictment so that the thirty bank fraud counts charged four bank fraud crimes. The court ordered that Mr. Mangano be resentenced for those four crimes. 11 F.3d at 860-61, 864. It affirmed Mr. Mangano's conviction in all other respects.

On January 3, 1994, Mr. Mangano filed a timely petition for rehearing and suggestion for rehearing en banc. The petition was denied and the suggestion rejected on September 19, 1994. App. 25a.

SUMMARY OF REASONS FOR GRANTING THE WRIT

1. Since 1991, at least ten circuit court opinions have addressed multiplicity challenges to indictments under the bank fraud statute. Remarkably, in more than half of

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[5] Submission was vacated on December 16, 1992, pending this Court's decision in *United States v. Olano*, 113 S. Ct. 1770 (1993). The appeal was resubmitted on April 26, 1993.

those cases, the courts have concluded that the bank fraud charges were multiplicitous. *See Molinaro, supra*; *United States v. Hord*, 6 F.3d 276, 280-83 (5th Cir. 1993), *cert. denied*, 114 S. Ct. 1551, 128 L.Ed.2d 200 (1994); *United States v. Lilly*, 983 F.2d 300, 302-05 (1st Cir. 1992); *United States v. Heath*, 970 F.2d 1397, 1401-02 (5th Cir. 1992), *cert. denied*, 113 S. Ct. 1643, 123 L.Ed.2d 265 (1993); *United States v. Saks*, 964 F.2d 1514, 1526 (5th Cir. 1992); *United States v. Lemons*, 941 F.2d 309, 316-18 (5th Cir. 1991). Even the decisions that have rejected multiplicity challenges to bank fraud indictments reveal courts' difficulty in resolving such challenges. *See United States v. Rimell*, 21 F.3d 281, 287 (8th Cir. 1994), *cert. denied*, 1994 WL 532952 (Oct. 31, 1994) (No. 94-6167); *United States v. Brandon*, 17 F.3d 409, 422-24 (1st Cir. 1994), *cert. denied*, 115 S. Ct. 80, 115 S. Ct. 81; *United States v. Barnhardt*, 979 F.2d 647, 650-51 (8th Cir. 1992); *United States v. Hammen*, 977 F.2d 379, 382-83 (7th Cir. 1992).

Until recently, a claim that an indictment was multiplicitous was relatively rare in federal court, and a court of appeals' agreement with such a claim was virtually unheard of. The bank fraud statute, which punishes one who "*executes*" or "*attempts to execute*" a "*scheme to defraud*" a financial institution, has changed that. As the sheer number of the decisions suggests, multiplicity challenges to bank fraud indictments have become matter-of-course, and they often succeed. *See Hord*, 6 F.3d at 278 (noting that the court was "once again" called upon to decide such a challenge). These challenges stem from the inability of the circuit courts to set forth a uniform method for determining what constitutes a bank fraud "unit of prosecution." *See Lilly*, 983 F.2d at 305 (recognizing that "the range of decisions reflects the diversity of factors entering into an evaluation of multiplicity claims under the bank fraud statute").

The extent of the resulting conflict both between and within the circuits is revealed by the different methods,

criteria and tests courts have adopted to determine whether bank fraud charges are multiplicitous. Courts in the Eighth Circuit look to the "contours of the scheme." *See Rimell*, 21 F.3d at 287. The First Circuit endorses a "factors" analysis. *See Brandon*, 17 F.3d at 422. The Fifth Circuit has suggested an "integral relation" test. *See Heath*, 970 F.2d at 1402.

These circuits, along with others, also rely on a less comprehensive approach, focusing on particular—and often conflicting—criteria. For example, one court has ruled that a deposit into a bank account, but not a withdrawal from that account, is an execution of a scheme to defraud, because the deposit places the bank at a risk of loss; another court has ruled that a withdrawal from a bank account is an execution of a scheme; and a third court has ruled that the risk of loss is of no consequence to the multiplicity analysis. *Hord*, 6 F.3d at 280-83; *United States v. Poliak*, 823 F.2d 371, 372 (9th Cir. 1987) *cert. denied*, 485 U.S. 1029, 108 S. Ct. 1586, 99 L.Ed.2d 901 (1988); *Heath*, 970 F.2d at 1402. Similarly, in one court separate executions of a scheme may be found where the defendant's transactions had different purposes, but in another court, separate executions may be found where the transactions had a common purpose. *Molinaro*, 11 F.3d at 860 n.16; *United States v. Harris*, 805 F. Supp. 166, 174-75 (S.D.N.Y. 1992). Some courts have found that each completion of a single scheme can give rise to only one bank fraud crime, even where the completion involves separate transactions; but other courts have ruled that each transaction may give rise to a separate bank fraud crime, even where the transactions are part of one completion of a single scheme. *Compare, e.g., Heath*, 970 F.2d at 1402, *with Molinaro*, 11 F.3d at 860-61.

Mr. Mangano's case illustrates this confusion in resolving multiplicity challenges to bank fraud indictments. He contended that the bank fraud statute punishes each execution of a scheme, not each act taken for the purpose

of executing the scheme, and that the thirty counts of bank fraud for which he was indicted were therefore multiplicitous. The court of appeals agreed. *Molinaro*, 11 F.3d at 860. Mr. Mangano further maintained that his indictment charged only one crime, because it alleged a single scheme, completed and executed only once. The court of appeals, however, grouped together different counts that, it stated, described four "chronologically and substantively independent" transactions, and found what it considered to be four executions. *Id.*

Only a decision by this Court can stem the rising tide of multiplicity challenges to bank fraud indictments. Only this Court can provide the lower courts with appropriate guidance so that the bank fraud statute is uniformly applied. After granting review, this Court should reverse the court of appeals' multiplicity decision in Mr. Mangano's case. The Court should rule that the term "executes," as used in 18 U.S.C. § 1344, means "completes," and that each "completion" of a charged scheme to defraud constitutes a single execution of the scheme and a single violation of § 1344, even where the completion of the scheme requires multiple transactions or acts. Likewise, the Court should hold that each attempted completion of a scheme can give rise to only one violation of § 1344, regardless of the number of acts or transactions involved in the attempt.

2. This case presents a second important question about the bank fraud statute: what must be alleged in a particular count of an indictment to adequately charge the crime of bank fraud.

It is well-established and generally undisputed that each count of an indictment must allege the essential elements of the charged offense. *Dunn v. United States*, 284 U.S. 390, 393, 52 S. Ct. 189, 190, 76 L.Ed. 356 (1932) (Holmes, J.). The bank fraud statute punishes one who "executes" or "attempts to execute" a scheme to defraud a financial institution. For a count of an indictment to allege adequately the crime of bank fraud, then, it must

charge that the defendant "executed" or "attempted to execute" a "scheme."

In Mr. Mangano's case, none of the thirty bank fraud counts alleged an "execution" or "attempted execution" of a scheme. Instead, each of the individual bank fraud counts alleged that a certain act was committed "*for the purpose of*" executing the scheme. This charging language appeared in the individual bank fraud counts of the grand jury's indictment, which was in turn based on the government's flawed theory as to what constitutes a unit of prosecution under § 1344.

The court of appeals erred in not finding the charging language of the individual counts of the indictment, and the counts themselves, deficient. To insure that federal prosecutors are not misinformed as to what must be alleged to adequately charge the crime of bank fraud, this Court should grant review and reverse the ruling of the court of appeals. The Court should hold that, to allege adequately the crime of bank fraud, each count of an indictment must allege that the defendant executed or attemped to execute a scheme to defraud.

3. A third important question about the bank fraud statute presented by this case is the scope of that statute: whether a scheme is punishable under § 1344 if it defrauds federal bank regulators, or whether it must defraud a financial institution.

The indictment in this case alleged that the purpose of the scheme was to defraud Ramona, a financial institution. At the conclusion of evidence, however, the government argued to the jury that it could find Mr. Mangano guilty of the bank fraud counts if it found that the scheme had defrauded federal regulators. The district court overruled Mr. Mangano's objection to this alteration of the indictment and expansion of the statute, and the court of appeals affirmed the district court's decision. *Molinaro,* 11 F.3d at 861.

That ruling conflicts with caselaw in the Second and District of Columbia Circuits that holds that § 1344 applies only to a scheme to defraud a bank. *United States v. Hubbard*, 889 F.2d 277, 280 (D.C. Cir. 1989); *United States v. Blackmon*, 839 F.2d 900, 905-06 (2d Cir. 1988). Although some federal statutes make it a crime to defraud federal bank regulators, § 1344 is not one of them. By its own terms, the statute applies only to a scheme that defrauds or is intended to defraud a "financial institution." The court of appeals' approval of the district court's ruling in this case is thus in error.

To ensure uniform application of the bank fraud statute, and to provide federal prosecutors with guidance as to when the bank fraud statute may be invoked, this Court should grant review and reverse the ruling of the court of appeals on this ground.

REASONS FOR GRANTING THE WRIT

I. THE CIRCUITS ARE IN DISARRAY AS TO HOW TO RESOLVE MULTIPLICITY CHALLENGES TO BANK FRAUD CHARGES

A. The First And Fifth Circuits Would Have Found Only One "Execution" Under § 1344 In Mr. Mangano's Case

The circuits agree that a unit of prosecution under the bank fraud statute is an "execution" or "attempted execution" of a scheme, and not each act performed to execute the scheme. *See, e.g., Molinaro*, 11 F.3d at 860; *Heath*, 970 F.2d at 1402. However, when the circuits attempt to determine just what constitutes an "execution" of a scheme, their rulings become confusing, inconsistent and conflicting. This case illustrates that conflict: Mr. Mangano's multiplicity claim would have been decided differently had it been raised in the Fifth Circuit or the First Circuit.

The grand jury charged Mr. Mangano and his co-defendant, Mr. Molinaro, with committing a single scheme: to sell Ramona for personal financial gain by

arranging for Mr. Mangano to secretly acquire Cherokee Village and thus falsely make Ramona appear profitable. According to the grand jury, this scheme was executed through a series of transactions that took place over an extended period of time.

The court of appeals agreed with Mr. Mangano that the bank fraud statute punishes each execution or attempted execution of a scheme. *Molinaro*, 11 F.3d at 859-60. It flatly rejected the government's position that the statute punishes each act taken in furtherance of the scheme. As it explained, "If each act in furtherance of a scheme to defraud a bank were a separate violation, a single criminal transaction could result in an infinite number of prosecutable offenses having no particular relevance to the purpose of the statute." *Id.* at 860 (citing *Lemons*, 941 F.2d at 318) (footnote omitted). According to the indictment, Mr. Mangano and his codefendant effected a single scheme to defraud Ramona. Indictment at ¶¶ 19-20. This is made plain by the indictment's charging language. Each of the individual thirty bank fraud counts alleged that a particular act was committed "*for the purpose of*" executing or attempting to execute the single scheme to defraud. *See, e.g.*, Indictment at ¶¶ 41, 50, 56, 59, 64 (emphasis added). Thus, although the single scheme involved multiple transactions, all of the transactions had the same purpose: to complete, or attempt to complete, the scheme. Indictment at ¶¶ 19-20. The indictment did not allege that the single scheme was repeated, or that it was executed or completed more than once. In fact, the scheme by its very nature could not be completed more than once. Therefore, the court should have ruled that the multiple bank fraud counts in the indictment charged only a single violation of § 1344.

The court of appeals did not, however, count the number of § 1344 violations the indictment charged by asking how many times the single scheme had been completed or executed. Rather, the court conducted a plenary review of the indictment to determine how many "execu-

tions" it could find. It ignored the charging language of the indictment, grouped together four sets of acts, and concluded that the indictment contained four executions.[6]

Caselaw from the Fifth Circuit demonstrates that Mr. Mangano's case would have been decided differently there. In *Lemons, supra*, the defendant defrauded a bank into approving and partially funding a $46 million loan for a residential and commercial development. For his part in the scheme, Lemons obtained personal financial benefit from a series of payments. The scheme involved numerous transactions, the execution of numerous documents, and numerous payments and other transfers of money. In attempting to determine whether the nine bank fraud counts in the indictment were multiplicitous, the court recognized that the word "executes," as used in § 1344, means "completes." 941 F.2d at 318. Accordingly, as the court also recognized, the bank fraud statute punishes each "completion" of a scheme as a separate crime; if a series of acts or transactions are all committed to complete a scheme, they all constitute a single crime, not multiple separate crimes. Using this analysis, the court in *Lemons* determined that the individual bank fraud counts constituted a single violation of § 1344. As the court explained, "[t]he movement of the benefit to Lemons, although in several separate stages or acts, was only part of but one performance, one completion, one execution of that scheme." *Id.*

Under the *Lemons* analysis, the thirty bank fraud counts in Mr. Mangano's indictment were multiplicitous, because they constituted only one violation of § 1344. The scheme charged in Mr. Mangano's case, under which

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[6] In the court's view, the transfer of the first 136 units of Cherokee Village and the later transfer of thirty-seven units were each an execution. *Molinaro*, 11 F.3d at 860. The court found a third execution in the concealment of Mr. Mangano's ownership interest in the five parcels of land in Palm Springs on which Ramona paid assessment bonds, and a fourth in the transfer of the Rancho Cielo property to Rumney. *Id.*

Mr. Mangano benefitted from Ramona's sale, involved multiple transactions and hundreds of documents and transfers of money, but all of those transactions, documents, and transfers were part of one performance, one completion, and one execution of the scheme.

The indictment against Mr. Mangano would be held to charge only a single violation of § 1344 under the First Circuit's analysis as well. In *Lilly*, *supra*, Lilly, a developer, sought financing to acquire an apartment complex and convert it to condominiums. He "pre-sold" twenty-nine of the units on a no-money-down basis with a promise of full financing, but had the purchasers sign documents that falsely inflated the prices of the units so that they appeared to have made down payments of ten percent. Those documents were submitted to a bank, and the accompanying individual mortgages assigned to the bank. The bank agreed to provide Lilly with a loan for $7 million for the project. Within a few months, Lilly had sold the project for $9 million. *Lilly*, 983 F.2d at 302. Lilly was indicted and charged with twenty-nine counts of bank fraud, one for each of the mortgages submitted and assigned to the bank.

The First Circuit concluded that all twenty-nine counts constituted a single violation of § 1344. 983 F.2d at 304. Lilly's scheme was to induce the bank to fund a loan so that he could acquire and then sell the project for personal gain. While the scheme involved countless acts, and was performed in distinct stages, it was completed and executed only once. The same is true in Mr. Mangano's case.

B. Lower Courts Have Adopted Confusing And Inconsistent Methods For Analyzing Multiplicity Challenges

The conflict and confusion in the opinions and rulings of the circuit courts is much broader than the conflict between the Ninth Circuit's decision in Mr. Mangano's case and First and Fifth Circuit decisions in *Lilly* and

Lemons. That conflict and confusion may be seen by examining the various methods the courts have endorsed in resolving bank fraud multiplicity claims.

In the Eighth Circuit, courts utilize a "contours" analysis to resolve bank fraud multiplicity claims. *See Barnhardt*, 979 F.2d at 651. Under this test, a court first determines the "contours" of the scheme and then determines how many times the defendant executed the scheme. Each execution is a separate offense. *Id.* As applied, however, the "contours" method does not provide any meaningful assistance in determining what constitutes an execution of a scheme.

For example, in *Rimell*, *supra*, the contours of the defendant's scheme were to use nominees to buy real property, purchase the property from the nominees at a higher price, obtain loans based on the higher price, and then divide the excess loan proceeds among himself and his employees. 21 F.3d at 283. Five properties were purchased in this way, and six banks were defrauded. The indictment charged eleven counts of bank fraud. The court upheld all eleven counts against the defendant's claim of multiplicity, but failed to explain how the defendant's "simple bank fraud scheme," through which he had defrauded six banks in connection with five properties, could be executed eleven times. *Id.*

The First Circuit has endorsed a "factors" test to determine how many executions, and thus how many separate crimes, are charged in a bank fraud indictment. *See Brandon, supra*; *Lilly*, *supra*. According to the court in *Brandon*, the factors include the number of banks, the number of transactions, and the number of movements of money. *Brandon*, 17 F.3d at 422. However, in *Brandon*, none of these factors made any difference in the court's decision. That case involved one bank, three methods for perpetrating the scheme, 176 separate loans, more than 176 transactions, and countless movements of money. *Id.* at 418-21. The court found that the twenty-six counts of bank fraud were not multiplicitous, and

suggested that the government could have charged 150 more, one for each loan. *Id.* at 423.

The Fifth Circuit has suggested that an "integral relation" test be used in determining whether separate transactions are part of a single execution or are multiple separate executions. *See Heath, supra.* In *Heath*, the defendants employed multiple misrepresentations to obtain two loans, one for $10 million and one for $3 million, from a single bank. The government argued that each loan constituted a separate crime of bank fraud, because each loan subjected the bank to a separate risk of loss. 970 F.2d at 1401. The court ruled, however, that the defendants had committed only one crime and only one execution of the charged scheme, because the two loans were "integrally related;" both were obtained to complete the scheme to sell thirty acres of Florida real estate owned by the defendants' bank. *Id.* at 1402.

Shortly after *Heath*, the Fifth Circuit considered a bank fraud indictment based on a scheme in which a defendant five times deposited bogus checks into a bank account and then attempted three times to withdraw the funds. *Hord, supra.* Although the court in *Heath* had rejected the argument that each separate risk of loss constitutes a separate execution, the court in *Hord* ruled that each deposit was a separate execution, because "[w]ith each deposit [the bank] was put at risk." 6 F.3d at 282. The court thus concluded that the nine counts of bank fraud in the indictment actually charged five crimes, one for each deposit. *Id.* at 281-82. In reaching this conclusion, however, the court recognized that there is "strong support for the rule that the scheme must be completed or performed in order for it to be executed." *Id.* at 282 (citing *Lemons*, 941 F.2d at 318).[7]

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[7] **The ruling in *Hord* also conflicted with the Ninth Circuit's decision in *Poliak*, 828 F.2d at 372 (holding that each draft on a bank account was a separate execution of a scheme to defraud).**

Other courts have used other analyses in attempting to determine what constitutes an execution of a scheme to defraud. For example, in *United States v. Mancuso*, 799 F. Supp. 567, 571 (E.D.N.C. 1992), the court concluded that "the common thread among the cases is that a scheme or artifice to defraud is 'executed' by the movement of money, funds or other assets from the institution." That common thread, however, is not to be found in either *Hord* or *Heath*, which, as demonstrated above, also contradict each other. Furthermore, that common thread is inconsistent with both the Fifth Circuit's decision in *Lemons* (in which the court found that multiple movements of money comprised a single execution) and the Ninth Circuit's decision in *Molinaro* (in which the court grouped multiple movements of money to find four executions).

In Mr. Mangano's case, the court of appeals concluded that the indictment contained four executions because, it contended, each of the four groups of transactions it found had a different purpose. *Molinaro*, 11 F.3d at 861. However, the court also stated that "two transactions may have a common purpose but constitute separate executions of a scheme." *Id.* (citing *Harris, supra*). *Harris*, the case cited by the court, introduces yet another test: a transaction is a separate execution if it imposes a separate obligation to make a truthful statement, even if it is integrally related to other transactions, and even if it does not expose the bank to any greater loss. *Harris*, 805 F. Supp. at 175.

C. This Court Should Rule That An "Execution" Is A "Completion" Of A Scheme

The confusion and conflict among the circuits has arisen from courts' repeated attempts to define an "execution" of a scheme. This Court should allay lower courts' difficulties by ruling that a unit of prosecution under § 1344 consists of a "completion" of the scheme

charged by the indictment or each completion that is attempted.

Such a ruling is consistent with the terms and purpose of the bank fraud statute. By prohibiting the execution of a scheme to defraud, the bank fraud statute makes each completion of a scheme a single crime. The very use of the term "execution" implies a completion. *See Lemons*, 941 F.2d at 318 (citing Black's Law Dictionary 567 (6th ed. 1991)). Moreover, if a single completion of a scheme can consist of multiple executions, and thus multiple violations of § 1344, the number of potential crimes from a single scheme to defraud becomes virtually limitless and an "execution" becomes impossible to define. *See Molinaro*, 11 F.3d at 860.

If an execution of a scheme is equivalent to a completion of the scheme, prosecutors will know that only a single count of bank fraud should be charged for each completion of the scheme to defraud or each completion that is attempted. If prosecutors fail to follow that rule, district courts will know that the counts are multiplicitous.[8]

D. The Indictment In This Case Alleged That Mr. Mangano Completed The Scheme Only Once And Thus Committed Only One Violation Of § 1344

In deciding Mr. Mangano's appeal, the Ninth Circuit failed to consider Mr. Mangano's multiplicity claim in light of the scheme charged in the indictment. As charged in the indictment, that scheme was to sell Ramona to his and Mr. Molinaro's benefit. Thus, the indictment charged a scheme that could by its very nature be completed only once.

If the scheme could be completed only once, it could not be executed more than once, even though it encom-

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[8] Where a single scheme is completed more than once, each completion is a separate violation of § 1344. *See Poliak, supra.*

passed separate transactions. Thus, according to the circuit court's own definition of a unit of prosecution, there could be only one crime, because there was only one completion—and thus only one execution—of the charged scheme.

The court of appeals found four executions. If there were four executions, however, the scheme must have been completed four times. But the four groups of transactions that the court labelled executions were actually only stages in the one-time completion of the single scheme charged by the grand jury.

The court concluded that each group of transactions was an "execution" because it found that each was "chronologically and substantively independent." *Molinaro*, 11 F.3d at 860. Whether the groups of transactions were chronologically independent is perhaps a close question, but there is no question that, under the language of the indictment, the transactions were substantively *interdependent*. The grand jury alleged that all of the acts were committed for the same purpose: to complete the scheme to defraud that would allow Mr. Mangano and Mr. Molinaro to sell Ramona for personal financial gain. (Moreover, the court's definition of an execution as a group of acts that is chronologically and substantively independent of other acts suggests that the court actually defined a scheme rather than an execution.)

E. Review Should Be Granted

Whenever circuit courts reverse more than fifty percent of district court rulings on a particular issue, something is wrong. According to the published cases, sixty percent of the circuit court opinions (six of ten) have found that district courts incorrectly denied multiplicity challenges to bank fraud charges and that prosecutors improperly drafted the charges. In addition to the obvious harm to defendants, such a reversal rate represents an enormous waste of resources and duplication of effort to the government, the public, and the judiciary.

There is nothing about the current opinions, either individually or collectively, that suggests that either the number of challenges or the reversal rate will decrease. To the contrary, given the widespread variations in the opinions and the number of challenges that have been successful, it is reasonable to expect that matters will get worse. Only a decision by this Court can provide the guidance and controlling principles needed by prosecutors to draft bank fraud indictments, by defense attorneys to determine whether bank fraud charges may be challenged, and by federal judges to decide such claims. To insure the uniformity of federal law, and to limit multiplicity challenges to bank fraud charges, this Court should grant review.

II. EACH OF THE BANK FRAUD COUNTS FAILED TO STATE A CRIME

A. Each Count Of An Indictment Must Adequately Allege A Crime

To properly allege a crime, a count of an indictment must identify and sufficiently describe the elements of the charged offense. *See Dunn*, 284 U.S. at 393, 52 S. Ct. at 190, 76 L.Ed. 356. Any count of an indictment that fails to allege a crime is defective, and must be dismissed upon a timely motion. *See id.* (holding that "[e]ach count in an indictment is regarded as if it was a separate indictment") (citations omitted); *see also Selvester v. United States*, 170 U.S. 262, 18 S. Ct. 580, 42 L.Ed. 1029 (1898) (holding that a jury's verdict on individual counts of an indictment is not rendered invalid by its failure to reach a verdict on other counts).

Under the Court's decision in *Dunn*, none of the bank fraud counts in the indictment against Mr. Mangano can stand, because not a single one would stand when regarded, as all must be, as a separate indictment. The court of appeals thus erred in affirming the district court's denial of Mr. Mangano's motion to dismiss the bank fraud counts.

B. The Charging Allegations In The Bank Fraud Counts

Each of the bank fraud counts identified a particular act, and alleged that the act was performed "for the purpose of" executing and attempting to execute the scheme. This language reflected the government's mistaken view that § 1344 punishes each act in furtherance of the charged scheme to defraud. None of the counts alleged that Mr. Mangano had actually executed or attempted to execute a scheme to defraud, and none of the counts described the scheme to defraud.

C. The Individual Counts Were Deficient

As discussed above, the court of appeals rejected the government's contention that each act in furtherance of a scheme to defraud is a separate crime, holding instead that each execution or attempted execution of a scheme to defraud is a separate violation of § 1344. *Molinaro*, 11 F.3d at 860.

Thus, for an indictment, or any individual count of an indictment, to adequately charge a violation of § 1344, the grand jury must allege in each count that the defendant executed or attempted to execute the scheme to defraud. Furthermore, the grand jury must in each count identify, explicitly or by incorporation, the scheme to defraud. An allegation that the defendant committed an act "for the purpose of" executing the scheme is simply insufficient to allege a crime.

Since each of the bank fraud counts alleged only that Mr. Mangano committed an act "for the purpose of" executing and attempting to execute the scheme, *see, e.g.*, Indictment at ¶¶ 41, 50, 56, 59, 64, and did not allege that Mr. Mangano executed or attempted to execute the scheme, each of the thirty bank fraud counts was deficient and failed to allege a crime.

D. Review Should Be Granted

Until the Ninth Circuit's decision in Mr. Mangano's case, that circuit followed this Court's decision in *Dunn*, as it was required to do, and had consistently ruled that each count of an indictment must sufficiently describe the crime charged. *See United States v. LeCoe*, 936 F.2d 398, 403 (9th Cir. 1991) (holding that "each individual count within an indictment must stand on its own"). Indeed, in *LeCoe* the Ninth Circuit recognized "the sanctity with which the courts, including the Supreme Court, have accorded each individual count" of an indictment. *Id.* at 404.

Other federal courts have also consistently obeyed this Court's decision in *Dunn*. *See United States v. Winter*, 663 F.2d 1120, 1138 (1st Cir. 1981), *cert. denied*, 460 U.S. 1011, 103 S. Ct. 1250, 75 L.Ed.2d 479 (1983); *United States v. Hernandez*, 980 F.2d 868, 871 (2d Cir. 1992); *United States v. Werme*, 939 F.2d 108, 111 (3d Cir. 1991), *cert. denied*, 112 S. Ct. 1165, 117 L.Ed.2d 412 (1992); *United States v. Fulcher*, 626 F.2d 985, 988 (D.C. Cir. 1980), *cert. denied*, 449 U.S. 839, 101 S. Ct. 116, 66 L.Ed.2d 46 (1980).

The court of appeals' decision in Mr. Mangano's case breaks with this precedent. It upholds individual counts of an indictment that fail to allege the essential elements of the charged crime. While such a decision might ordinarily be regarded as an anomaly, not deserving of review by this Court, the confusion in the circuits concerning the interpretation and application of the bank fraud statute counsels against simply ignoring the court of appeals' action.

Review of the court of appeals' decision on this issue presents an opportunity for this Court to provide much-needed guidance to the circuit and district courts, as well as federal prosecutors, concerning the essential elements of a § 1344 violation and what must be alleged to prop-

erly charge a defendant with violating that statute. Failure to address this issue will permit prosecutors to obtain voluminous indictments in one circuit but not in others, making national application of the bank fraud statute uneven. Allowing the Ninth Circuit's decision to stand subjects defendants in that circuit—but not in other circuits—to the risk of double jeopardy, as they may be found guilty on multiple counts for a single crime. The Court should grant Mr. Mangano's petition. It should hold that the bank fraud counts in Mr. Mangano's indictment failed to allege a crime and should have been dismissed for that reason.

III. THE BANK FRAUD STATUTE PUNISHES A SCHEME TO DEFRAUD A FINANCIAL INSTITUTION, NOT A SCHEME TO DEFRAUD FEDERAL REGULATORS

A. The Government Relied On Proof Of A Fraud Against The Regulators To Prove The Bank Fraud Charges

The bank fraud statute punishes a scheme "to defraud a financial institution." 18 U.S.C. § 1344(1). The bank fraud counts in the indictment against Mr. Mangano complied with this requirement, charging that the scheme was to defraud "Ramona, its officers, directors, depositors and investors."

During the charging conference, however, the government announced for the first time that it was altering the theory of fraud alleged in the indictment. The prosecutor told the court and defense counsel that "the basis for our bank fraud theory" was that the defendants did not "report accurately to . . . the regulators." Transcript of Proceedings, 9/26/1989, at 20 (hereafter "RT: —/—: —"). Throughout the charging conference, the government emphasized that it was going to argue in summation that the bank fraud counts were proved by evidence that the defendants defrauded or deceived the

government or federal regulators. RT: 9/26: 15-16, 20, 41-48.

The defendants vigorously objected to this change in the factual basis for the bank fraud charges. *Id.* Although the court did not instruct the jury on the new factual basis, the court authorized the government to argue to the jury that Mr. Mangano was guilty of the bank fraud counts if the bank regulators were defrauded. RT: 9/26: 48-50. Accordingly, in its initial summation and in its rebuttal summation, the government described the way in which the federal regulators were defrauded and stated that the scheme was to deceive federal regulators. RT: 9/27: 26, 34, 57-58; RT: 9/28: 156.

The change in the factual basis of the bank fraud charges—from a finding that the statute required a fraud on Ramona itself to a finding that the statute included fraud on federal regulators—constituted an impermissible variance and impermissibly expanded the scope of § 1344.

B. The Court Of Appeals' Ruling Is In Error And Conflicts With The Decisions Of Other Circuits

In affirming the district court, the court of appeals authorized a conviction under the bank fraud statute based on proof that a scheme to defraud was perpetrated against federal bank regulators. *Molinaro*, 11 F.3d at 861. There are statutes that make it a crime to defraud bank regulators, *see, e.g.*, 18 U.S.C. §§ 1005, 1006, but 18 U.S.C. § 1344 is not one of them.

The court of appeals attempted to explain its ruling by stating that "[t]he fact that appellants' misrepresentations were designed to conceal their fraudulent conduct from the [FHLBB] does not mean the appellants defrauded only the regulators." 11 F.3d at 861. This explanation does not cure the impermissible expansion of § 1344, however, because it ignores the government's explicit argument that the jury should find Mr. Mangano guilty of

bank fraud if it found a scheme to defraud federal bank regulators. RT: 9/27: 26, 34, 57-58, 59; RT: 9/28: 156. Under the court of appeals' decision, then, a defendant in the Ninth Circuit can be found guilty of a violation of § 1344 based on proof that he or she executed a scheme to defraud federal regulators.

The decision of the court of appeals puts the law of the Ninth Circuit in conflict with the law of the Second and District of Columbia Circuits. The Second Circuit, in *Blackmon, supra,* after conducting an extensive analysis of the legislative history of § 1344 and giving deference to the intended broad scope of the statute, correctly concluded that the subject and victim of a fraud under § 1344 must be the bank. 839 F.2d at 905-06. The District of Columbia Circuit agrees. *Hubbard, supra.* As the court stated in *Hubbard,* "[t]o be sure, § 1344 only covers frauds against banks themselves." 889 F.2d at 280.

C. Review Should Be Granted

Whether the bank fraud statute reaches a scheme to defraud federal regulators is yet another aspect of § 1344 about which the circuits are in conflict. The conflict on this issue itself justifies granting review. Together with the other questions concerning § 1344 raised in this petition, it points to the need for this Court to provide authoritative guidance in interpreting and applying the bank fraud statute.

CONCLUSION

For the foregoing reasons, this Court should grant this petition and issue a writ of certiorari to review the decision of the Ninth Circuit Court of Appeals as to each of the questions stated above.

Respectfully submitted,

WILLIAM J. GENEGO *
ELIZABETH A. NEWMAN
LAW OFFICES OF
WILLIAM J. GENEGO
100 Wilshire Boulevard
Suite 1000
Santa Monica, California 90401
(310) 394-5802
Attorneys for Petitioner

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* Counsel of Record